applied to public or quasi-public corporations,[8] to grant the same power to enterprises not affected with a public interest is not consonant with the common law methods of protecting property. The determination of this question resolves itself into a matter of policy in the disposition of private rights, and since in the majority of these cases the public is the party primarily concerned, the proper proceeding would be to compel the defendant to acquire its rights so to act by constitutional condemnation.

WHAT LAW GOVERNS CONTRACTS OF INTERSTATE CARRIAGE?—The frequency of contractual provisions exempting carriers partially or entirely from their common law liability, and the diversity between the rules of the several states as to the validity of such provisions[1] have necessitated repeated judicial consideration of the question as to what law determines the validity or invalidity of such stipulations. In absence of legislation by Congress on the subject,[2] the question is one of the conflict of state laws,[3] since under the police power it is competent for the state legislatures,[4] or courts[5] to decide, even in cases of interstate carriage, whether these contracts shall be upheld.

The cases almost universally recognize the basic principle that *prima facie* the *lex loci contractus* governs, unless the contract is wholly to be performed elsewhere. But in the application of this doctrine the results reached in the various jurisdictions are by no means harmonious. In one jurisdiction the delivery is considered to be the entire performance, consequently, the law of the place of delivery is enforced.[6] This view is, however, based on a false assumption of fact, for any part of the journey constitutes as much part of the performance as the delivery.

The rule of most jurisdictions in which exemption stipulations are held invalid is that, though they would be sustained by the *lex loci contractus,* comity does not require the courts to enforce agreements

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[8]In cases where the business is affected with a public interest the attitude of the New York courts in the Elevated and Subway Railway Cases is a typical example. See 3 COLUMBIA LAW REVIEW 413.

[1]1 Page, Contracts, 559 *et seq.;* 13 COLUMBIA LAW REVIEW 249.

[2]Congress has exercised its undoubted power to enact such legislation by the Carmack Amendment to the Hepburn Act. Act of June 29, 1906, *ch.* 3591, § 7, pars. 11, 34 Stat. at Large 595. For the interpretation of this statute, see Carpenter *v.* U. S. Exp. Co. (1912) 120 Minn. 59.

[3]Aside from the federal statutes there is a class of cases where the federal law is applied practically, if not theoretically. It is well known that the federal courts decide questions of "general commercial law" on their independent judgment unless there is a state statute on the subject; Swift *v.* Tyson (1842) 16 Pet. 1; and the Supreme Court has held that exemption stipulations fall within the operation of this principle. Liverpool Steam Co. *v.* Phenix Ins. Co. (1889) 129 U. S. 397.

[4]Chicago, etc. Ry. *v.* Solan (1898) 169 U. S. 133, affirming (1895) 95 Ia. 260.

[5]Penn. R. R. *v.* Hughes (1903) 191 U. S. 477, affirming (1902) 202 Pa. 222; Davis *v.* Chicago, etc. Ry. (1896) 93 Wis. 470.

[6]Pittsburgh, etc. Ry. *v.* Sheppard (1897) 56 Oh. St. 68.

contrary to their own public policy.[7] But it is difficult to see how the public policy of any jurisdiction can prevent it from enforcing contracts, not immoral, made elsewhere, and relating to negligent acts to be performed elsewhere.[8] And even if the rule is limited to cases where the negligence occurred within the jurisdiction of the forum,[9] its practical inconvenience[10] outweighs any theoretical merit it may possess. Pennsylvania has adopted the rule that the law of the place where the injury occurs should prevail;[11] but the burden of establishing the exact location of the accident would in many cases be insurmountable.

In trying to establish a foundation upon which to rest the solution of this question, the courts have given considerable weight to the so called intention of the parties. This is well illustrated by the interesting conclusion recently reached by the Oklahoma Supreme Court in the case of *Atchison etc. Ry.* v. *Smith* (1913) 132 Pac. 494. The court laid down the rule that exemption stipulations will be upheld, if they are valid under the law of any one of the states through which the carriage is to be made, though it be void under the *lex loci contractus*. The court proceeds upon the theory that everyone is conclusively presumed to know the law; that the parties to this contract must be deemed to have intended its enforcement; and that, consequently, they must have contemplated the application of that law which upholds, rather than that which denies, the validity of their agreement. It has been held, however, that even an expressed intention of the parties cannot, under the "law of the forum" doctrine, require the enforcement of a contract which is contrary to such law;[12] and it is equally illogical, in any case, to permit parties by mere intention to validate that which is contrary to public policy.[13] In these cases, moreover, it is seldom that the parties have any real intention on the subject;[14] and certainly the presumption that every one knows the law is an obvious fiction;[15] consequently the intention of the parties

[7]See The Kensington (1902) 183 U. S. 263; 2 COLUMBIA LAW REVIEW 160; Adams Exp. Co. *v.* Chamberlin-Johnson-DuBose Co. (1912) 138 Ga. 455; Lake Shore & Mich. So. Ry. *v.* Teeter (1906) 166 Ind. 335; Chicago, etc. Ry. *v.* Gardiner (1897) 51 Neb. 70; Adams Exp. Co. *v.* Green (1911) 112 Va. 527.

[8]It is conceived that no court would apply the policy of a forum where the contracts is to be performed entirely without its jurisdiction. See The Fri (C. C. A. 1907) 154 Fed. 333; Shelton *v.* Canadian Northern Ry. (C. C. 1911) 189 Fed. 153.

[9]The rule is so limited in one jurisdiction. Adams Exp. Co. *v.* Walker (1904) 119 Ky. 121.

[10]The inconvenience referred to is two-fold; it will often be difficult to establish where the injury occurred, and the rights of the parties will vary according to the jurisdiction where the action is brought.

[11]Hughes *v.* R. R. (1902) 202 Pa. 222.

[12]Knott *v.* Botany Mills (1900) 179 U. S. 69.

[13]See Liverpool Steam Co. *v.* Phenix Ins. Co., *supra;* Hughes *v.* R. R. *supra.*

[14]See Cleveland etc. Ry. *v.* Druien (1904) 118 Ky. 237, 243.

[15]Keener, Quasi Contracts, 85 *et seq.*

should play little or no part in the determination of the question.[16] The real basis of the rule should be policy and convenience. And the rule that, whenever part performance is to be made within the *locus contractus,* its law should govern[17] has the advantage of being simple and easy to apply, and above all, of making the operation and effect of a contract independent of the purely fortuitous circumstance that the *lex fori* may permit or prohibit its enforcement.

[16]The doctrine of the principal case seems to have the support of only three decided cases, see The Oranmore (D. C. 1885) 24 Fed. 922; Talbott *v.* Merchants' Despatch Transp. Co. (1875) 41 Ia. 247; Ryan *v.* M. K. & T. Ry. (1885) 65 Tex. 13, all of which are either overruled or apparently ignored in later decisions in their own jurisdictions. Knott *v.* Botany Mills, *supra;* Hazel *v.* Chicago etc. Ry. (1891) 82 Ia. 477; Pittman *v.* Pacific Ex. Co. (1900) 24 Tex. Civ. App. 595.

[17]Dyke *v.* Erie Ry. (1871) 45 N. Y. 113; Valk *v.* Erie Ry. (N. Y. 1909) 130 App. Div. 446; Ill. Cent. R. R. *v.* Beebe (1898) 174 Ill. 13; Hazel *v.* Chicago etc. Ry. *supra;* O'Regan *v.* Cunard Co. (1894) 160 Mass. 356; Hartmann *v.* Louisville & N. Ry. (1889) 39 Mo. App. 88; Meuer *v.* Chicago etc. Ry. (1898) 11 S. D. 94; see Davis *v.* Chicago etc. Ry., *supra.* In the exceptional case where the contract is to be performed in two or more states, wholly outside of the jurisdiction where it is made, the law of the place wherein the principal performance is to take place should be applied. This would follow from the application of the universally accepted rule that where performance is to take place entirely in one jurisdiction its law will prevail.